

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 873 Pub. Rec./Execution Information

**SPONSOR(S):** Maney

**TIED BILLS:** IDEN./SIM. BILLS: SB 1204

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice & Public Safety Subcommittee	14 Y, 0 N	Padgett	Hall
2) Government Operations Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Section 922.105, F.S., requires a death sentence to be carried out by lethal injection unless the person sentenced to death affirmatively elects to be executed by electrocution. The Secretary of the Department of Corrections (DOC) is responsible for developing the protocols for executing a person under sentence of death by lethal injection or electrocution, including selecting and procuring the drugs and equipment which are used in a lethal injection.

Because of the controversial nature of the death penalty, a person involved in carrying out an execution could be subject to harassment, intimidation, or physical harm. Similarly, an entity involved in supplying the drugs or equipment used in administering a lethal injection could be the subject of negative publicity and a resulting loss of business. Recognizing this, the Legislature enacted s. 945.10(1)(g), F.S., which provides that information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection is confidential and exempt from disclosure as a public record. This public records exemption clearly applies to the executioner and persons participating in an execution, however, because the exemption does not explicitly exempt manufacturers and retailers that are the source of the drugs and equipment used in lethal injections, it is unclear how a court would interpret such exemption.

HB 873 creates s. 945.10(1)(j), F.S., to exempt information or records that identify or could reasonably lead to the identification of any person or entity that participates in, has participated in, or will participate in an execution, including persons or entities administering, compounding, dispensing, distributing, maintaining, manufacturing, ordering, preparing, prescribing, providing, purchasing, or supplying drugs, chemicals, supplies, or equipment necessary to conduct an execution in compliance with law. The bill provides the exemption applies to information and records held by DOC before, on, or after the date the bill becomes a law. The bill ensures that the identities of the manufacturers and retailers that supply lethal injection drugs to DOC are exempt from disclosure and ensures DOC will be able to obtain the drugs necessary to carry out executions in the future.

The exemption is subject to the Open Government Sunset Review Act and will be automatically repealed on October 2, 2027, unless the Legislature reenacts the exemption. The bill provides a statement of public necessity as required by the Florida Constitution.

The bill does not appear to have a fiscal impact on state or local governments.

The bill is effective upon becoming a law.

**Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill appears to expand an existing public record exemption; thus, it requires a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Public Records

Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for exemption from public records requirements provided the exemption passes by two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption (public necessity statement), and is no broader than necessary to meet its public purpose.<sup>1</sup>

The Florida Statutes also address the public policy regarding access to government records. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt. Furthermore, the Open Government Sunset Review Act<sup>2</sup> provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose and the "Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption."<sup>3</sup> In addition, the exemption may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or
- Protect trade or business secrets.<sup>4</sup>

Under s. 119.15(3), F.S., a new public records exemption or substantial amendment of an existing public records exemption is repealed on October 2 of the fifth year following enactment, unless the Legislature reenacts the exemption.

Public records exemptions apply prospectively,<sup>5</sup> unless the Legislature provides clear intent that the exemption apply retroactively.<sup>6</sup>

##### Executions

##### *Methods of Execution*

Section 922.105, F.S., requires a death sentence to be carried out by lethal injection unless the person sentenced to death affirmatively elects to be executed by electrocution. The Secretary of the Department of Corrections (DOC) is responsible for developing the protocols for executing a person under sentence of death by lethal injection or electrocution, including selecting and procuring the drugs and equipment which are used in a lethal injection.<sup>7</sup> Currently, Florida uses a combination of three drugs to carry out a death sentence: etomidate, rocuronium bromide, and potassium acetate.<sup>8</sup>

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<sup>1</sup> Art. I, s. 24(c), Fla. Const.

<sup>2</sup> S. 119.15, F.S.

<sup>3</sup> S. 119.15(6)(b), F.S.

<sup>4</sup> *Id.*

<sup>5</sup> *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 784 So.2d 438, 440-441 (Fla. 2001).

<sup>6</sup> *Campus Communications, Inc. v. Earnhardt*, 821 So.2d 388, 396 (Fla. 5th DCA 2002), *review denied*, 848 So.2d 1153 (Fla. 2003).

<sup>7</sup> S. 922.105(1), F.S.

<sup>8</sup> Florida Department of Corrections, *Lethal Injection Protocol*, <http://www.dc.state.fl.us/ci/docs/Lethal-Injection-Protocol-2021-05-07.pdf> (last visited Jan. 18, 2022).

Etomidate is a sedative that induces unconsciousness, rocuronium bromide is a paralytic, and potassium acetate stops the heart.<sup>9</sup>

### *Public Records Exemption*

Because of the controversial nature of the death penalty, a person involved in carrying out an execution could be subject to harassment, intimidation, or physical harm. Similarly, an entity involved in supplying the drugs or equipment used in administering a lethal injection could be the subject of negative publicity and a resulting loss of business. Recognizing this, the Legislature enacted s. 945.10(1)(g), F.S., which provides that information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection is confidential and exempt from disclosure as a public record. This public records exemption clearly applies to the executioner and persons participating in an execution, however, because the exemption does not explicitly exempt manufacturers and retailers that are the source of the drugs and equipment used in lethal injections, it is unclear how a court would interpret such exemption.

### *Objection to Use of Lethal Injection Drugs*

In recent years, in response to public pressure and Europe's prohibition against the export of execution drugs, many pharmaceutical companies have objected to states using drugs which they manufacture in lethal injections, including major drug companies such as Pfizer, Roche, and Janssen (Johnson & Johnson).<sup>10</sup> As such, many drug manufacturers have either placed strict controls on the sale of drugs commonly used in lethal injections, or have refused to supply such drugs to correctional agencies in states that have the death penalty.<sup>11</sup> In response, many states, including Florida, have had to repeatedly amend their lethal injection protocols to account for the difficulty in obtaining lethal injection drugs.<sup>12</sup> Florida last changed the drugs used in the lethal injection protocol in January 2017 when it began using etomidate and potassium acetate instead of midazolam hydrochloride and potassium chloride.<sup>13</sup>

### **Effect of Proposed Changes**

HB 873 creates s. 945.10(1)(j), F.S., to exempt information or records that identify or could reasonably lead to the identification of any person or entity that participates in, has participated in, or will participate in an execution, including persons or entities administering, compounding, dispensing, distributing, maintaining, manufacturing, ordering, preparing, prescribing, providing, purchasing, or supplying drugs, chemicals, supplies, or equipment necessary to conduct an execution in compliance with ch. 922, F.S. The bill provides the exemption applies to information and records held by DOC before, on, or after the date the bill becomes a law. The bill ensures that the identities of the manufacturers and retailers that supply lethal injection drugs to DOC are exempt from disclosure and ensures DOC will be able to obtain the drugs necessary to carry out executions in the future.

The exemption is subject to the Open Government Sunset Review Act and will be automatically repealed on October 2, 2027, unless the Legislature reenacts the exemption.

The bill provides a statement of public necessity as required by the Florida Constitution, stating that disclosure of records that identify or could lead to the identification of persons or entities that participate

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<sup>9</sup> Death Penalty Information Center, *Overview of Lethal Injection Protocols*, <https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-injection-protocols> (last visited Jan. 18, 2022).

<sup>10</sup> Erick Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, New York Times (May 13, 2016), <https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html> (last visited Jan. 18, 2022); Death Penalty Information Center, *Statements from drug manufacturers and medical professionals*, <https://deathpenaltyinfo.org/executions/lethal-injection/statements-from-drug-manufacturers-and-medical-professionals> (last visited Jan. 18, 2022).

<sup>11</sup> Death Penalty Information Center, *Johnson & Johnson unit speaks out at planned death row drug use*, [https://files.deathpenaltyinfo.org/legacy/files/pdf/2017.08.21\\_JansenStatement\\_LethalInjection.pdf](https://files.deathpenaltyinfo.org/legacy/files/pdf/2017.08.21_JansenStatement_LethalInjection.pdf) (last visited Jan. 18, 2022).

<sup>12</sup> Bernie Woodall, *Florida set to carry out execution with drug not previously used in lethal injections*, Reuters (Aug. 24, 2017), <https://www.reuters.com/article/florida-execution/corrected-florida-set-to-carry-out-execution-with-drug-not-previously-used-in-lethal-injections-idUSL2N1L805A> (last visited Jan. 18, 2022).

<sup>13</sup> Dara Kam, *Florida changes lethal injection drugs*, News4Jax (Jan. 5, 2017), <https://www.news4jax.com/news/2017/01/05/florida-changes-lethal-injection-drugs/> (last visited Jan. 18, 2022).

in an execution could jeopardize the safety of such persons or entities and expose them to harassment, intimidation, or harm and also thwart the ability of DOC to obtain the necessary personnel, drugs, chemicals, supplies, or equipment needed to carry out an execution.

The bill is effective upon becoming a law.

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 945.10, F.S., relating to confidential information.

**Section 2:** Provides a public necessity statement.

**Section 3:** Provides an effective date of upon becoming a law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

None.

**2. Expenditures:**

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

None.

**2. Expenditures:**

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

**1. Applicability of Municipality/County Mandates Provision:**

Not applicable. The bill does not appear to affect county or municipal governments.

**2. Other:**

Vote Requirement

Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record exemption. The bill appears to expand an existing public record exemption, thus, it requires a two-thirds vote for final passage.

#### Public Necessity Statement

Article I, section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record exemption. The bill appears to expand an existing public records exemption, thus, it includes a public necessity statement.

#### Breadth of Exemption

Article I, section 24(c) of the Florida Constitution requires a newly created or expanded public record exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill appears to expand an existing public records exemption to protect the suppliers of drugs and equipment used in lethal injections from disclosure.

#### B. RULE-MAKING AUTHORITY:

Not applicable.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**